

NO. 86-1446

**IN THE SUPREME COURT
of the
UNITED STATES**

October Term, 1986

DELMUS PUNTON,

Petitioner,

vs.

CITY OF SEATTLE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

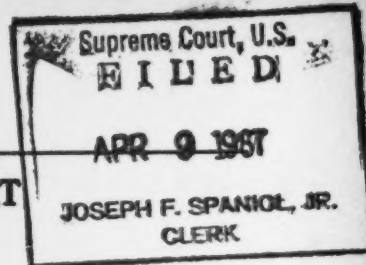
BRIEF IN OPPOSITION

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April 8, 1987



QUESTIONS PRESENTED

The petition for a writ of certiorari filed by petitioner herein is in response to a ruling by the United States Court of Appeals for the Ninth Circuit that the petitioner could not assert claims for damages and attorney's fees pursuant to 42 U.S.C. § 1983 in federal court because he had split his single cause of action and had previously secured a judgment on that cause of action in state court.

The questions raised by this petition are the following:

1. Should this Court grant certiorari where the facts of this case are unlikely to recur and where no substantial federal question is presented?

2. Should this Court grant certiorari to review petitioner's claim when the

Ninth Circuit applied principles of res judicata approved by this Court to reject petitioner's claim, and where there are no conflicts among the circuits or novel questions of law?

3. Should this Court grant certiorari where the Ninth Circuit properly found that petitioner's claim was barred by Washington law?

TABLE OF CONTENTS

	<u>Page</u>
Questions Presented	i
Table of Contents	ii
Tables of Authorities	iv
Introduction	1
Counterstatement of the Case	2
A. Administrative Proceedings	2
B. State Court Proceedings - "Punton I"	4
C. Federal Court Proceedings - "Punton II"	6
Reasons for Denying Certiorari	10
1. Supreme Court Review Is Not Appropriate For This Case Because It Is Factually Unlikely to Recur and No Substantial Federal Question Is Presented	12
2. The Ninth Circuit Applied the Standard Adopted By This Court for Determining Whether the Judgment In Punton I Had a Claim Precluding Effect On Punton's Federal Court Action	16
3. Punton's Federal Court Claim Is Not Allowable Under Washington Law Because It Represents Part of a Split Cause of Action and Was Merged Into Punton's State Court Judgment	18

Conclusion	23
Appendix	A-1

TABLE OF AUTHORITIES

Table of Cases

<u>Clark v. Yosemite Community College District</u> , 785 F.2d 781 (9th Cir. 1986)	17, 18
<u>Cleveland Board of Education v. Loudermill</u> , 470 U.S. 532, 84 L.Ed. 2d 494, 105 S.Ct. 1487 (1985)	10, 13, 14
<u>Danielson v. Seattle</u> , 45 Wn. App. 235, 724 P.2d 1115 (Div. I, 1986)	15, 16
<u>Dept. of Labor & Industries v. City of Kennewick</u> , 31 Wn. App. 777, 644 P.2d 1196 (Div. III, 1982), <u>rev'd on other grounds</u> , 99 Wn.2d 225, 661 P.2d 133 (1983)	21
<u>Hansen v. Seattle</u> , 45 Wn. App. 214, 724 P.2d 371 (Div. I, 1986)	14-15
<u>In re Bouchat</u> , 11 Wn. App. 369, 522 P.2d 1168 (Div. I, 1974)	21
<u>McConnell v. Seattle</u> , 44 Wn. App. 316, 722 P.2d 121 (Div. I, 1986)	14, 15, 16
<u>Memphis Community School District v. Stachura</u> , ___ U.S. ___, 91 L.Ed.2d 249, 106 S.Ct. 2537 (1986)	20
<u>Migra v. Warren City School District Board of Education</u> , 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984)	9, 16, 17, 18, 23, 24

<u>Norco Construction, Inc. v. King County,</u> 801 F.2d 1143 (9th Cir. 1986) . .	17, 18
<u>Punton v. Seattle Public Safety Com'n.,</u> 32 Wn. App. 959, 650 P.2d 1138 (Div. I, 1982), <u>review denied</u> , 98 Wn.2d 1014 (1983)	12, 15, 16
<u>Rains v. State,</u> 100 Wn.2d 660, 674 P.2d 165 (1983)	22
<u>Sanwick v. Puget Sound Title Ins. Co.,</u> 70 Wn.2d 438, 423 P.2d 624 (1967)	21, 23
<u>Scoggin v. Schrunk,</u> 522 F.2d 436 (9th Cir. 1975), <u>cert. denied</u> , 423 U.S. 1066, 46 L.Ed.2d 657, 96 S.Ct. 807 (1976)	22
<u>Seattle-First National Bank v. Kawachi,</u> 91 Wn.2d 223, 588 P.2d 725 (1978) . .	17
<u>Sprague v. Adams,</u> 139 Wash. 510, 247 Pac. 960 (1926)	20, 23
<u>Williams v. Seattle,</u> 607 F. Supp. 714 (W.D. Wash. 1985)	12-13, 14

Statutes

42 U.S.C. § 1983	i, 9, 11, 16, 22
42 U.S.C. § 1988	7, 8

Other Authority

2	Orland, <u>Washington Practice</u> , § 361 (1972)	20
1	<u>Restatement (Second) of Judgments</u> , §§ 24, 25 (1982)	21-22
	Trautman, <u>Claim and Issue Preclusion</u> <u>in Washington</u> , 60 Wash. L. Rev. 805 (1985)	19

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BRIEF IN OPPOSITION

This brief is submitted by respondent
The City of Seattle in opposition to the
petition of Delmus Punton for a writ of
certiorari to the United States Court of
Appeals for the Ninth Circuit.

COUNTERSTATEMENT OF THE CASE

A. Administrative Proceedings:

The petitioner, Delmus Punton, is an officer in the Seattle, Washington Police Department. He was subjected to progressive discipline for a variety of conduct infractions culminating in a five-day suspension for using information obtained under police authority for personal purposes. (Petition for Certiorari Appendix G-4.)

Thereafter Punton was found to have committed four more offenses:

- (1) Allowing unauthorized civilians to ride in his patrol car;
- (2) Disobeying a supervisor's direct order;
- (3) Broadcasting a tape of drunken Japanese conversation and hysterical laughter over his patrol car public address system while his car was parked on the sidewalk outside a liquor store

in an area with a predominantly Asian population; and

(4) Using unnecessary and unreasonable force in removing Phillip Williams from inside a hospital, where Williams had sought treatment for a possible heart attack. Williams, a passenger in a car that had been observed committing traffic infractions, was followed by Punton into the hospital and ordered to return to the car. When Williams protested, saying he was having a heart attack, Punton gripped him in a hammerlock, threatened to break his arm if he did not comply, and forced him outside to discuss the infractions.

Through an internal police department investigation, Punton was given notice and the details of these four allegations as well as an opportunity to explain his conduct. He also received a full evidentiary

hearing by a police discipline panel after his employment was terminated.

Punton appealed his discharge to the Seattle Public Safety Civil Service Commission, arguing that the Seattle Police Department's Manual of Rules and Procedures guaranteed him a full evidentiary hearing before he could be fired and that its omission violated his due process rights. The Commission upheld Punton's discharge, finding all of the accusations supported by substantial evidence, and concluding that the "discharge of Delmus Punton from the Seattle Police Department was done in good faith, and for cause." (Petition for Certiorari Appendix G-5.)

B. State Court Proceedings - "Punton I":

The administrative decision was reviewed by the King County Superior Court. In that proceeding Punton again argued that his discharge from employment

prior to a full evidentiary hearing was a deprivation of due process under the United States Constitution. The state trial court judge found that each of the grounds on which the Police Chief based his decision to discharge Punton was supported by substantial evidence.

(Petition for Certiorari Appendix H-6.)

The trial court held, however, that the City's failure to accord Punton a full evidentiary hearing as provided by the Seattle Police Department's Manual and the applicable collective bargaining agreement, before subjecting Punton to discipline, violated his constitutional rights to due process of law. (Petition for Certiorari Appendix H-9 through -11.) The trial court reinstated Punton to the Seattle Police Department effective September 22, 1980; awarded him back pay from September 22, 1980, through the date of the trial court's order plus

prejudgment interest at 8 percent; ordered that the City's personnel records be corrected to reflect the court's decision; and awarded Punton attorney's fees of \$15,000. (Petition for Certiorari Appendix I.)

The Washington State Court of Appeals affirmed the trial court's decision regarding Punton's constitutional rights. It held that Punton's discharge prior to a full evidentiary hearing pursuant to the provisions of the Police Department's Manual constituted an infringement of a substantive "property" interest and a prima facie deprivation of due process.

Review was denied by the Washington State Supreme Court. (Petition for Certiorari Appendix K.)

C. Federal court proceedings - "Punton II":

Between the dates that the King County Superior Court and the Washington State Court of Appeals respectively ruled on

Punton's due process claim, the petitioner started the separate proceedings below. His complaint in federal district court alleged that, because he was

"terminated without prior notice or hearing, his property interests were denied without due process having been afforded as required by the United States Constitution and 43 U.S.C. § 1983."

(Appendix A, infra.) Punton's complaint requested, as relief, reinstatement effective September 22, 1980; damages; costs, disbursements and attorney's fees pursuant to 42 U.S.C. § 1988; and such other relief as the court considered appropriate.

After the Washington State Supreme Court denied both the City's petition for review of the State Court of Appeals decision on the due process issue and Punton's petition on the denial of attorney's fees, Punton moved for summary judgment in the federal court action.

The City responded with a motion requesting dismissal on res judicata grounds. The district court ruled in Punton's favor and against the City, holding that res judicata principles did not bar Punton's second action but, rather, established the City's liability for damages. A judgment was entered awarding Punton \$150,000 after a jury returned a verdict in that amount. Punton then petitioned the court for \$509,993.25 in attorney's fees, based on claimed fees of \$78,460.50 times a requested multiplier of 6.50. The district court awarded him only \$15,000.

The City appealed the district court's judgment, assigning error to the denial of its motion for dismissal on res judicata grounds. Punton cross-appealed the district court's refusal to award the full amount of attorney's fees requested pursuant to 42 U.S.C. § 1988.

A divided panel of the Ninth Circuit reversed the district court. (Petition for Certiorari Appendix B.) The majority acknowledged that, in cases arising under 42 U.S.C. § 1983,

"a prior state court judgment has the same preclusive effect that the judgment would have in the courts of the state in which it was rendered..."

citing Migra v. Warren City School District Board of Education, 465 U.S. 75, 83, 104 S.Ct. 892, 897, 79 L.Ed.2d 56 (1984). (Petition for Certiorari Appendix B-7.) The Ninth Circuit then determined that Washington law bars a second litigation of a claim that has been actually litigated in an earlier proceeding. (Petition for Certiorari Appendix B-8.) It found Punton had a single claim or cause of action for a deprivation of due process.

After noting that Punton received through state court proceedings everything

he lost, the Ninth Circuit concluded that Punton's decision to litigate his claim first through state proceedings and then in federal court constituted an impermissible splitting of his cause of action under Washington law. (Petition for Certiorari Appendix B-15.) The Ninth Circuit reversed the district court and dismissed Punton's cross-appeal as moot. Punton then filed his petition for certiorari with this Court.

REASONS FOR DENYING CERTIORARI

Were the petitioner's due process claim heard initially, today, he would receive no relief whatsoever. This Court's decision in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 84 L.Ed.2d 494, 105 S.Ct. 1487 (1985), settled that substantive property rights cannot be defined by the procedures provided for their deprivation. Loudermill

emasculated the Washington state decision giving him relief. In considering the federal claim, the Ninth Circuit followed this Court's instructions to apply Washington law to determine the claim preclusive effect of the petitioner's state court judgment on his federal lawsuit under 42 U.S.C. § 1983. By suing the respondent in both state and federal courts for the same violation of due process, the petitioner attempted to split a single cause of action. Alternatively, when he secured relief through the state court, the petitioner's federal claim became merged with the state court judgment. By reversing the federal district court, the Ninth Circuit produced the right result. Accordingly, Punton's petition should be denied.

1. Supreme Court review is not appropriate for this case because it is factually unlikely to recur and no substantial federal question is presented.

In Punton v. Seattle Public Safety Com'n., 32 Wn. App. 959, 964-65, 650 P.2d 1138 (Div. I, 1982), review denied, 98 Wn.2d 1014 (1983), "Punton I", the Washington State Court of Appeals concluded that the Seattle Police Department's Manual granted Punton a substantive right to a full evidentiary hearing regarding potential discipline against him. It reasoned that because the Manual established "elements of a substantive 'property' interest...", a failure to follow the Manual's procedures gave rise to a prima facie deprivation of due process. (Petition for Certiorari Appendix J-20 & -21.)

The district court in Williams v. Seattle, 607 F.Supp. 714 (W.D. Wash.

1985), characterized that analysis as "misguided", citing the distinction between substance and procedure in the context of Due Process Clause guarantees that this Court emphasized in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 84 L.Ed.2d 494, 503, 105 S.Ct. 1487, 1493 (1985). It held that Williams, another Seattle police officer subjected to discipline in a manner inconsistent with the Manual's requirements,

"was constitutionally entitled only to notice of the charge, an explanation of the evidence against him, and an opportunity to respond prior to the Chief's disciplinary decision."

Williams, 607 F.Supp. at 721. (Emphasis added.) In a flat rejection of Punton I, Williams concluded that the City's failure to follow the identical Manual and collective bargaining agreement provisions did not constitute a prima facie deprivation of due process.

Since Williams and this Court's determination in Loudermill, there has been a rapid retrogression from the reasoning of Punton I and a consistent effort by various panels of the State Court of Appeals to distinguish it away. In McConnell v. Seattle, 44 Wn. App. 316, 325, 722 P.2d 121 (Div. I, 1986), review denied, 107 Wn.2d 1007 (1986), the Washington State Court of Appeals concluded that neither the Manual nor the collective bargaining agreement provides a right to a full evidentiary hearing to a police officer charged or likely to be charged with a felony. McConnell held that a Seattle police officer's constitutional rights do not include a full evidentiary hearing as provided by the Manual but only the minimal due process described in Loudermill, supra.

In Hansen v. Seattle, 45 Wn. App. 214, 221-22, 724 P.2d 371 (Div. I,

1986), the same court concluded that Punton I did not address police officer's rights under the collective bargaining agreement. It held that, because no full evidentiary hearing is guaranteed by that agreement to officers subject to discipline, the failure of a terminated officer to resort to contractual remedies or to seek administrative relief precluded judicial review of his termination.

In Danielson v. Seattle, 45 Wn. App. 235, 242-44, 724 P.2d 1115 (Div. I, 1986), certiorari granted, 107 Wn.2d 1013 (1986), the Court of Appeals reached the same conclusion as the McConnell court. Finding support in the Williams criticism and other federal decisions, the court in Danielson flatly declared that the City's failure to comply with the Manual's procedures was neither a violation of constitutional standards nor an error of constitutional magnitude.

Were the facts in Punton to be repeated, today, no due process deprivation would be found. Loudermill, Williams, and Danielson have provided clear directions regarding pertinent substantive and procedural requirements. No substantial federal question remains for determination by this Court.

2. The Ninth Circuit applied the standard adopted by this Court for determining whether the judgment in Punton I had a claim precluding effect on Punton's federal court action.

In Migra v. Warren City School District Board of Education, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984), this Court held that a federal district court hearing an action arising under 42 U.S.C. § 1983 should apply the law of the forum state when deciding matters of claim preclusion. This was precisely what the Ninth Circuit did when it ruled that

petitioner's federal lawsuit was barred.
(Petition for Certiorari Appendix B-7
& -22.)

Contrary to petitioner's assertions, this holding does not constitute a departure from the decisions of this Court, nor does the holding conflict with any rule adopted in other circuits. The Ninth Circuit was guided, in part, by its earlier holding in Clark v. Yosemite Community College District, 785 F.2d 781 (9th Cir. 1986). Punton's petition admits that the holding in Migra is the basis for the Ninth Circuit's decisions in Clark and Norco Construction, Inc. v. King County, 801 F.2d 1143, 1146 (9th Cir. 1986). (Petition for Certiorari 10.) The Ninth Circuit's reference to Seattle-First National Bank v. Kawachi, 91 Wn.2d 223, 588 P.2d 725 (1978), and its characterization of Punton's litigation strategy as an impermissible

splitting of a single cause of action demonstrate that it focused on Washington law in applying Migra.

Certiorari is not warranted in light of the fact that the Ninth Circuit applied Migra in the instant case, just as it did in Clark and in Norco, supra. This case does not demonstrate disregard for Migra or a conflict between circuit courts of appeal.

3. Punton's federal court claim is not allowable under Washington law because it represents part of a split cause of action and was merged into Punton's state court judgment.

"Claim preclusion, more traditionally called res judicata, is a doctrine designed to curtail the relitigation of a claim or cause of action. For the doctrine to apply, there must be substantial identity in the successive proceedings. More particularly, the Washington Supreme Court has stated for almost seven decades that a judgment has claim preclusive effect only if the successive

proceedings are identical in four respects: (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made."

Trautman, Claim and Issue Preclusion in Washington, 60 Wash. L. Rev. 805, 812 (1985). (Footnote omitted.)

The petitioner's motion for summary judgment before the federal district court admitted that his state court and federal court proceedings were identical in each of these respects. On page 4 of his motion, Punton confessed that

"the subject matter in both the state and federal cases involves the same facts, the same persons, the same arguments, the same case law, the same constitutional amendments, the same everything. Even the counsel are the same. The only difference is that plaintiff sought reinstatement in the state court, but seeks damages in the federal court."

(Clerk's Paper 25 submitted to the Ninth Circuit Court of Appeals.) That

"difference" was not a sufficient basis for allowing Punton's federal lawsuit to proceed to judgment.

The petitioner had only a single claim or cause of action for a deprivation of due process, "a species of tort liability. . . ." Memphis Community School District v. Stachura, ____ U.S. ____, 91 L.Ed.2d 249, 258, 106 S.Ct. 2537 (1986). Under Washington law, a single tort can be the subject of only one lawsuit. 2 Orland, Washington Practice, § 361 p. 402 (1972), citing Sprague v. Adams, 139 Wash. 510, 247 Pac. 960 (1926). Under Sprague, property damages and damages for personal injuries arising from a single tort cannot be made the subjects of separate lawsuits against the same defendant.

Punton was not precluded from seeking, in a single lawsuit, relief for all of the damages resulting from his termination.

It is state policy that all litigation between the same parties, arising out of the same transaction, be determined in — one action to avoid a multiplicity of lawsuits. In Re Bouchat, 11 Wn. App. 369, 522 P.2d 1168 (Div. I, 1974); Dept. of Labor & Industries v. City of Kennewick, 31 Wn. App. 777, 644 P.2d 1196 (Div. III, 1982) rev'd on other grounds, 99 Wn.2d 225, 661 P.2d 133 (1983).

Washington courts are required to dismiss subsequent actions where relief could and should have been sought in a prior action. Sanwick v. Puget Sound Title Ins. Co., 70 Wn.2d 438, 423 P.2d 624 (1967). The Restatement (Second) of Judgments, §§ 24 and 25 succinctly state the rule applied:

"§ 24 Dimensions of "Claim"
for Purpose of Merger or Bar
-- General Rule Concerning
"Splitting"

(1) When a valid and final judgment rendered in an action extinguishes the plaintiff's

claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

"§ 25 Exemplifications of
General Rule Concerning
Splitting

The rule of § 24 applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action:

- (1) To present evidence or grounds or theories of the case not presented in the first action, or
- (2) To seek remedies or forms of relief not demanded in the first action."

Section 1983 actions can be barred by res judicata principles. Rains v. State, 100 Wn.2d 660, 674 P.2d 165 (1983); Scoggin v. Schrunk, 522 F.2d 436, 437 (9th Cir. 1975), cert. denied, 423 U.S. 1066, 46 L.Ed.2d 657, 96 S.Ct. 807 (1976).

By attempting to secure reinstatement, monetary damages and attorney's fees

through federal proceedings at the same time he was engaged in state proceedings to regain his job and obtain back wages and attorney's fees, Punton split his single cause of action. The judgment entered by the state court should have had a preclusive effect on his federal court claims, consistent with established Washington law. Sanwick and Sprague, both supra. The Ninth Circuit applied Migra as it should have, correctly interpreting Washington claim preclusion law as a prohibition against Punton's federal lawsuit.

CONCLUSION

The district court should have denied the petitioner's motion for summary judgment and granted the City's motion to dismiss on res judicata grounds simply on the basis of the admissions in Punton's motion and the principle under Washington

law that remedies available for a single claim or cause of action cannot be sought in separate lawsuits. The City has been required to reinstate an officer with back pay in spite of having established solid grounds for his termination. Monetary damages and attorney's fees are not appropriate in this case. The Ninth Circuit's decision corrected the district court's error in this case and is the right result, and a fair result. It follows this Court's instructions in Migra, demonstrates no conflict with another circuit, and presents no substantial federal question. For these reasons, respondent The City of Seattle respectfully requests this Court to deny Punton's petition for a writ of certiorari.

Respectfully submitted this 8th day
of April, 1987.

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APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DELMUS PUNTON,)	
)	
Plaintiff,)	NO. C82-397
)	
vs.)	COMPLAINT AND JURY
)	DEMAND
CITY OF SEATTLE,)	
)	
Defendant.)	
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I. PARTIES

1.1 Delmus Punton is a citizen
residing in the Western District of
Washington.

1.2 The City of Seattle is a
municipal corporation incorporated under
the laws of the State of Washington and
located within the Western District of
Washington.

II. JURISDICTION

2.1 The court has jurisdiction over the parties pursuant to 28 USC §1331 because this case arises under the United States Constitution and the laws of the United States; viz., 42 USC §1983 and 42 USC §1988.

III. ALLEGATIONS OF FACT

3.1 On September 22, 1980, the City of Seattle summarily terminated the employment of plaintiff, a permanent employee with eleven years of service as a Seattle police officer.

3.2 Delmus Punton was given no prior notice of discharge nor was he given an opportunity to be heard prior to termination.

3.3 Pursuant to the applicable civil service rules, Delmus Punton has a legitimate expectation of continued employment with the City of Seattle because his employment could only be terminated for cause. The City of Seattle concedes that Delmus Punton possessed a property interest in his continued employment with the City of Seattle.

IV. CLAIMS PRESENTED

4.1 Because Delmus Punton was terminated without prior notice or hearing, his property interests were denied without due process having been afforded as required by the United States Constitution and 43 USC §1983.

4.2 Delmus Punton has suffered hardship, both mental and physical, as a result of his wrongful discharge.

V. RELIEF REQUESTED

Plaintiff requests the court to grant the following relief:

5.1 Reinstatement, effective September 22, 1980.

5.2 Damages in an amount to be determined at the time of trial.

5.3 Cost, disbursements and attorney's fees pursuant to 42 USC §1988.

5.4 Such other and further relief as the court may consider appropriate following a full trial.

VI. JURY DEMAND

6.1 Pursuant to FRCP 38 and Local Rules, W.D. Wash. 38(b), plaintiff demands a jury on the issue of damages as identified in paragraph 4.2 above.

DATED this 8th day of April, 1982.

CLINTON, FLECK, GLEIN & LINVILLE

By: /s/

Lawrence B. Linville
Attorneys for plaintiff